Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MIGUEL A. RODRIGUEZ,
Petitioner

versus

MUHLENBERG HOSPITAL CENTER,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

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I. WHETHER OR NOT AN ELDERLY HISPANIC HOSPITAL SECURITY GUARD PROTECTED BY TITLE VII AND ADEA CAN BE FIRED BECAUSE HE HEROICALLY PROTECTED A NURSE BEING PHYSICALLY ASSAULTED BY A PRISONER-PATIENT MERELY BECAUSE THE HOSPITAL'S CEO TESTIFIED THAT HE FIRED THE ELDERLY HISPANIC FOR STRIKING A PATIENT, WITHOUT ANY INVESTIGATION INTO THE FACTS CONCERNING THE ASSAULT BY THE PRISONER-PATIENT?

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OPINIONS AND ORDERS BELOW

The Order of the United Court of Appeals for the Third Circuit rendered 24, 1999 is unrecorded and appears at page 1a of the Appendix.

The Judgment Order of the United States Court of Appeals for the Third Circuit is unrecorded and appears at page 6a of the Appendix.

The Memorandum Order of the United States District Court for the Eastern District of Pennsylvania dated is unrecorded and appears at page 7a of the Appendix.

The Memorandum Order of the United States District Court for the Eastern District of Pennsylvania dated June 25, 1998 is unrecorded and appears at page 17a of the Appendix.

JURISDICTION

The final order of the Court of Appeals for the Third Circuit dated June 24, 1999. This Petition for Writ for Certiorari is filed timely within ninety (90) days thereof. The jurisdiction of this Honorable Court rests upon 28 U.S.C. §1254(1) and Rule 10(c) of this Honorable Court.

FEDERAL PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, Title VII as amended, 42 U.S.C. §2000(e) et seq. at Appendix page 21.

The Age Discrimination in Employment Act ["ADEA"], 29 U.S.C. §623(a) at Appendix page 21.

CONCISE STATEMENT OF FACTS

Miguel A. Rodriguez is an Hispanic male born in Puerto Rico in September 1936. In 1984, Muhlenberg Hospital hired Mr. Rodriguez to work as a security guard. As an elderly Hispanic male, Rodriguez was protected under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C §2000(c) et seq. and the Age Discrimination in Employment Act, 29 U.S.C. §621-34.

Muhlenberg Hospital had written policies specifically detailing the appropriate force for a security officer to use against an unruly patient in a "code green" situation. Appendix 3a. These policies provided that a security officer was supposed to protect the nurses, and not abuse or fight with the patients. The policy also provided that a security officer was entitled to use force in self-defense, and the policy mirrored the language of the Pennsylvania Crimes Code concerning self-defense, 18 Pa. C.S.A. §505-06. Appendix 3a. ("A security officer may use force against a person whom he reasonably believes such force is necessary for self-defense"). The written policies do not provide that a security officer for Muhlenberg is never supposed to use force against a hospital patient in any circumstances.

On October 28, 1995, Officer Anthony Lopsonzski of the Northampton County Police Department arrested an unconscious male asleep at the wheel of a running car with an empty bottle of liquor in the car. The officer took the arrestee to Muhlenberg Hospital for a blood-alcohol test. Appendix 7a.

Upon arriving at the Muhlenberg Hospital Emergency Room, Officer Lopsonzski informed the hospital personnel that the intoxicated person had a history of being violent when intoxicated. Officer Lopsonzski informed hospital personnel to exercise caution when dealing with this intoxicated patient. Due to this information, the intoxicated

patient was placed in soft restraints onto a bed. Donna Beahm, a nurse, remained in the room with the intoxicated patient, and unrestrained the patient at the patient's request. Donna Beahm told Mr. Rodriguez, who was on duty at that time, that she would call him if she needed assistance with the intoxicated patient. Mr. Rodriguez, returned to the security office a short distance away. Mr. Rodriguez, then almost 60 years old, was 5'4" tall and weighed about 165 pounds while the drunk patient was thirty five years younger than he, about 6'4" tall and over 200 pounds.

Approximately five minutes later, Mr. Rodriguez heard nurses screaming, and immediately ran to the room where the intoxicated patient remained with nurse Donna Beahm. Appendix 15a. Miguel Rodriguez observed the intoxicated patient out of bed and swinging and throwing punches at Donna Beahm. As Mr. Rodriguez dutifully placed his body between the drunk and unruly patient and Donna Beahm, the drunk patient struck Rodriguez in the face, knocking off his spectacles. Mr. Rodriguez then came around the drunk patient's back and tried to get the drunk patient under control. Rodriguez sustained minor injuries from the punch to the face and was treated by an emergency room doctor. The nurses congratulated and thanked Miguel for professionally handling the unruly patient.

No hospital official who was allegedly investigating the incident ever asked Mr. Rodriguez what happened.

"Q. It didn't matter to you as to whether or not anybody even heard Plaintiff's side of the story, correct?

A. What mattered to me was that I was convinced based on the investigation undertaken by various members of hospital personnel that Mr. Rodriguez had struck a patient. I didn't need to have further information, because I don't tolerate that kind of activity."

Testimony by CEO.

BEST AVAILA

Muhlenberg terminated Mr. Rodriguez on November 20, 1995. Appendix 7a. The hospital ultimately replaced him with employees who were substantially younger, and/or non-Hispanic.

In response to a question posed by the trial judge, Mr. Mason testified that under absolutely no circumstances would it be appropriate for a security guard at the hospital to strike a patient. Prior to trial, the trial court wrote as follows:

> "Rather than receive a commendation, Rodriguez was fired for violating Muhlenberg's alleged, undocumented policy that under no circumstances should a security officer ever strike or hit a patient. In fact, Muhlenberg's written policy expressly authorizes security officers to "use force against a person when he reasonably believes such force is necessary for self defense, in order to protect himself [or others] from bodily harm." Appendix 18a.

Despite this earlier reading, at the close of Plaintiff's evidence, Defendant moved for judgment as a matter of law under Fed.R.Civ.P. 50, on the grounds that Plaintiff had not put forth enough evidence that Defendant's proffered reason for termination was pretextual. Following oral argument on October 16, 1998, the district court granted the motion for judgment as a matter of law. The District Court inexplicably reversed its own finding at the summary judgment stage. Appendix 7a v. Appendix 17a. Upon appeal, the United States District Court of Appeals for the Third Circuit affirmed the district court order adopting the "subjective test" articulated by the hospital CEO, namely, it did not matter that

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the CEO violated hospital policy regarding hospital policy on use of force, or that the CEO did not know the true facts of the incident. The fact that the CEO fired the security guard for striking a patient could not be attacked as pretextual because the CEO believed that the security guard struck a patient:

> "The evidence clearly shows that the CEO fired Rodriguez because he believed that Rodriguez had punched a patient."
>
> Opinion and Order, Court of Appeals 42.

The question to be decided by this court is whether a subjective belief concerning the articulated legitimate business reason contrary to established facts is sufficient to defeat a claim under Title VII on ADEA.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

Review by certiorari is appropriate in the case at bar under Rule 10(c) of the Rules of the United States Supreme Court in that a United States court of appeals has decided an important federal question in a way that conflicts with relevant decisions of this Honorable Court.

I. WHETHER OR NOT AN ELDERLY HISPANIC HOSPITAL SECURITY GUARD PROTECTED BY TITLE VII AND ADEA CAN BE FIRED BECAUSE HE HEROICALLY PROTECTED A NURSE BEING PHYSICALLY ASSAULTED BY A PRISONER-PATIENT MERELY BECAUSE THE HOSPITAL'S CEO TESTIFIED THAT HE FIRED THE ELDERLY HISPANIC FOR STRIKING A PATIENT, WITHOUT ANY INVESTIGATION INTO THE FACTS CONCERNING THE ASSAULT BY THE PRISONER-PATIENT?

In dismissing the elderly Hispanic employee's claim the Court of Appeals opinion held as follows:

> "The evidence, clearly shows that the CEO fired Rodriguez because he believed that Rodriguez had punched a patient. Rodriguez therefore has no ADEA or Title VII claim." Court of Appeals Opinion 42 of June 24, 1999

The Court of Appeals subjective test provides a simple method for employers to obliterate the protection of ADEA and Title VII, namely, the subjective belief of the CEO is controlling, not the objective facts. Using such a subjective test, an employer may always terminate a protected employee based upon false reports to the CEO which comes from biased sources. Once the CEO testifies at trial that he

believed grounds existed to terminate the protected employee irrespective of objective facts and appellate both the trial court created an irrebuttable presumption was that the articulated legitimate business reason was valid. Mr. Rodriguez thus seeks review of the Court of Appeals opinion, which provides to corporate employers as immunity not intended by the Legislature or this Honorable Court.

As the Court of Appeals correctly noted, the parties agreed that Mr. Rodriguez asserted a prima facie case under ADEA and Title VII by showing that: "(1) he is an Hispanic male Title VII over forty (ADEA), (2) qualified for the position, (3) who was dismissed despite being qualified and (4) was replaced by a person sufficiently younger to allow an inference of age discrimination (ADEA) and outside of the protected racial class (Title VII). Appendix page 2a (citations omitted).

Upon the showing of a prima facie case, the burden shifted to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejections." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Employer's CEO claimed he believed that Mr. Rodriguez punched a patient, justifying termination. Mr. Rodriguez was obligated to demonstrate that the hospital's proffered reason for termination was unworthy of credence. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256, 101 S.Ct. 1089, 1095 (1981).

By accepting the subjective belief of the CEO as an irrebuttable presumption of a legitimate business reason, despite an objective reality for that belief, the Court of Appeals interjected an impossible burden of proof on the employee and eviscerated the statutory protection given the employee by Federal Law.

Here, the hospital failed to conduct any real investigation into the circumstances surrounding Mr. Rodriguez' alleged misconduct in attempting to subdue a

young, unruly patient. Indeed, the CEO testified that the reason for hitting the patient (protecting the nurse from a physical assault) was irrelevant.

Here, the hospital made a calculated decision not to obtain complete information regarding the altercation which led to Mr. Rodriguez's termination.

The alleged "victim of patient abuse at the hands of plaintiff" never complained about or filed a report against plaintiff and no one in defendant's organization ever contacted the "alleged victim" regarding abuse by plaintiff.

The events leading to plaintiffs termination transpired after Sergeant Lopsonzaski delivered an extremely intoxicated male, with known vicious propensities to the Emergency Room (ER), which predictably led to the drunk's attack upon various nurses and a security guard. Out of the drunk's attack upon various staff originated the routine report concerning the unruliness of the patient. From this report, Defendant described how it "sprang" into action and attempted to escalate one incident report which did not target Mr. Rodriguez into a legitimate reason to terminate him.

The hospital's after-the-fact justification/explanation of an alleged "investigation" is unworthy of credence. The CEO testified that the fact of punching the patient was the only relevant criteria, not the fact that the hitting may have occurred in self-defense.

Obvious weaknesses and deficiencies exist in defendant's proffered legitimate reason for termination. Once the trial court and the Court of Appeals applied the "subjective test" to the CEO's stated reason, then it created an absolute defense to the claim under Title VII and ADEA.

As a matter of binding precedent, this Honorable Court has held that the fact-finder's disbelief of the reasons proffered by the hospital (particularly if disbelief is accompanied by suspicion of mendacity), may, together with the elements of a prima facie case suffice to show intentional

discrimination. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510-11, 113 S.Ct. 2742, 2749, 125 L.Ed.2d 407 (1993).

Here, defendant never bothered to conduct an investigation. Defendant never spoke to nor obtained statements from the majority of eyewitnesses. The "subjective belief" test applied to the CEO created an irrebutable presumption of a legitimate business reason. That test must be stricken down by this Honorable Court.

At the trial in this matter, the decision-maker who terminated Mr. Rodriguez, CEO William Mason, testified that he did not consider the circumstances of the incident. Mr. Mason testified that he did not need to know anything else about the incident, other than that the alleged investigation disclosed that Miguel Rodriguez punched a patient:

Q. It didn't matter to you as to whether or not anybody even heard [plaintiff's] side of the story, correct?

A. What mattered to me was that I was convinced based on the investigation undertaken by various members of hospital management personnel that Mr. Rodriguez had struck a patient. I didn't need to have further information, because I don't tolerate that kind of activity.

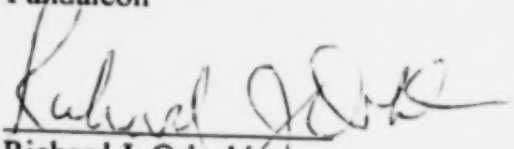
At very least, genuine issues of material fact existed precluding judgment as a matter of law.

The Court of Appeals order and opinion thus ought to be reviewed by the Honorable Court because the Court of Appeals adopted a new test never articulated by this Honorable Court and contrary to accepted and binding precedent written by this Court for employers to obliterate the protection of ADEA and Title VII.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari ought to be granted.

Respectfully submitted,
Orloski, Hinga &
Pandaleon



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Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1999

MIGUEL A. RODRIGUEZ,

Petitioner

v.

MUHLENBERG HOSPITAL CENTER

Respondent

APPENDIX OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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MEMORANDUM OPINION OF THE COURT

NYGAARD, Circuit Judge.

Rodriguez appeals the District Court's grant of judgment as a matter of law under Fed. R. Civ. P. 50(a) for appellee, Muhlenberg Hospital, following a trial on Rodriguez's race and age discrimination claims. Our view of this grant is plenary. See Doby v. DeCrescenzo, 171 F.3d 858, 873-74 (3d Cir. 1999). Granting judgment as a matter of law is appropriate only when viewing the evidence in the light most favorable to the party opposing the motion, no jury could decide in that party's favor. See Walter v. Holiday Inns, Inc., 985 F.2d 1238 (3d Cir. 1993). We will affirm.

I.

The facts are well known to the parties and we will merely summarize. Rodriguez is a Hispanic male who was 62 years old when he worked as a security guard at the hospital. He was fired after an altercation with a drunk and unruly patient, during which he was reported to have punched the patient in the face. Rodriguez sued under the Age Discrimination in Employment Act, 29 U.S.C. §621, et seq. ("ADEA"), and Title VII of the Civil Rights Act, 42 U.S.C. §2000e-1 et seq. The parties accept that Rodriguez asserted a prima facie case under both Acts by showing that: (1) he is an Hispanic man (Title VII) over forty (ADEA), (2) qualified for the position, (3) who has dismissed despite being qualified, and (4) who was replaced by a person sufficiently younger to allow an inference of age discrimination (ADEA) and outside the protected racial class (Title VII). See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)(Title VII); Billet v. CIGNA Corp., 940 F.2d 812, 816 n.3 (3d Cir. 1991)(ADEA).

Upon the showing of a prima facie case, the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." McDonnell Douglas, 411 U.S. at 802. Muhlenberg met that burden when its CEO testified that he fired Rodriguez because Rodriguez had punched a patient. See A317 ("I didn't need to have further information, because I don't tolerate that kind of activity."). The CEO also testified that, based on his understanding of the hospital's investigation, there was no doubt in his mind that Rodriguez's behavior was inappropriate. See A321.

Thus, this case turns on the third step in which the plaintiff bears the burden of showing evidence by which the fact finder could either: (1) disbelieve the employer's proffered reason, or (2) conclude that discrimination was more likely the primary motivation behind the firing. See Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994). Rodriguez relies on the first prong of Fuentes, arguing that he produced evidence from which a fact finder could disbelieve the Hospital's stated reason. Such evidence, however, must be sufficient to show "not merely that the employer's proffered reason was wrong, but that it was so plainly wrong that it cannot have been the employer's real reason." Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1109 (3d Cir. 1997). In this regard, Rodriguez fails.

Rodriguez's primary argument is that the Hospital CEO's explanation of this reason for firing Rodriguez contradicted the Hospital's written policy regarding force. Even if it did, however, this fact is simply insufficient to create a reasonable belief that the CEO's stated reason was pretext. Employer's may often act out of accord with their policies, but this alone does not indicate that their stated reasons for acting are pretextual. Rodriguez also asserts that:

(1) he did not punch the patient, (2) there was no written policy explicitly prohibiting the punching of a patient, and (3) the Hospital was not entitled to fire him. Again, even if these are all true, they still do not suggest that the stated reason for his firing was a pretext. The evidence clearly shows that the CEO fired Rodriguez because he believed that Rodriguez had punched a patient. Rodriguez therefore has no ADEA or Title VII claim. The fact that his firing may have been "wrong or mistaken" simply does make it actionable under either of these statutes. See Fuentes, 32 F.3d at 765.

II.

In sum, Rodriguez has not met the threshold burden of showing that a reasonable fact finder could disbelieve Muhlenberg's proffered reason for firing Rodriguez. The judgment as a matter of law was therefore proper and will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Richard L. Nygaard
Circuit Judge

UNREPORTED - NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 98-2048

MIGUEL A. RODRIGUEZ,
Appellant
V.
MUHLENBERG HOSPITAL CENTER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 97-CV-00636)
District Judge: Honorable Bruce W. Kauffman

Submitted Under Third Circuit LAR 34.1(a)
June 17, 1999

BEFORE: Nygaard, Stapleton and Cowen, Circuit Judges.

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on June 17, 1999.

On consideration whereof it is now ordered and adjudged by this court that the judgment of the district court entered on October 16, 1998, is hereby AFFIRMED.

Costs taxed against appellant.

ATTEST:

_____

Clerk

Date: 24 June 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MIGUEL RODRIGUEZ	:	CIVIL ACTION
Plaintiff	:	NO. 97-CV-636
	:	
vs.	:	
	:	
MUHLENBERG	:	
HOSPITAL CENTER	:	
Defendant	:	

MEMORANDUM OPINION

Bruce W. Kauffman, J.

This Opinion follows an Order of the Court, dated October 16, 1998, granting judgment as a matter of law in favor of Defendant Muhlenberg Hospital Center ("Muhlenberg" or "the hospital") in this race and age discrimination case.

I. BACKGROUND

Plaintiff Miguel Rodriguez ("Plaintiff") is a sixty-two year-old Hispanic male, who worked as a security guard for Muhlenberg between 1984 until his termination on November 21, 1995. On October 28, 1995, Plaintiff was involved in an altercation with an unruly patient (known in the trial as "John Doe") in Muhlenberg's emergency room. It was undisputed that during the incident, the patient struck Plaintiff and Plaintiff, in turn, physically subdued the patient. In dispute was whether Plaintiff struck "John Doe" in the face in the course of subduing him. Muhlenberg conducted an investigation and fired Plaintiff because, contrary to

undisputed hospital policy, he had punched the patient during the altercation.

Subsequently, Plaintiff filed this suit, claiming that he was subjected by Muhlenberg to age and national origin discrimination, in violation of the Age Discrimination in Employment Act, 29 U.S.C. §621 et seq., and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-1 et seq. He alleged that his age and national origin were the real motives underlying Muhlenberg's decision to terminate him. In response, Muhlenberg asserted that the decision to terminate was based solely on the fact that Plaintiff had punched a patient in violation of Muhlenberg policy.

At the end of Plaintiff's case, Muhlenberg moved, pursuant to Rule 50(a) of the Federal Rules of Civil Procedure, for judgment as a matter of law. Because Plaintiff had failed to introduce any evidence from which a reasonable jury could rationally conclude that Muhlenberg's explanation of its decision to terminate was pretextual and, in reality, motivated by a discriminatory animus, the Court granted Muhlenberg's motion.

II. DISCUSSION

In Order to establish a prima facie case of age discrimination, a plaintiff must prove that: a) he is over 40; b) he was qualified for the position that he wished to retain; c) he was dismissed despite being qualified; and d) he was ultimately replaced by a person sufficiently younger to permit an inference of age discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Billet v. CIGNA Corp., 940 F.2d 812, 816 n.3 (3d Cir. 1991). In order to establish a prima facie case of national origin discrimination, a plaintiff must show that: a) he is a member of an ethnic minority; b) he was qualified for the position that he wished to retain; c) he was dismissed from the position despite being

qualified; and d) he was ultimately replaced by a person outside the protected class. Id. [1]

Once a plaintiff proves his prima facie case of discrimination, the burden of production shifts to the defendant to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." McDonnell Douglas, 411 U.S. at 802. The employer satisfies this burden by producing evidence which, if true, would "permit the conclusion that there was a nondiscriminatory reason for the unfavorable employment decision." Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994). "The employer need not prove that the tendered reason actually motivated its behavior, as throughout this burden-shifting paradigm the ultimate burden of proving intentional discrimination always rests with the plaintiff." Id. Once the employer has satisfied its burden of production, the plaintiff may avoid summary judgment or judgment as a matter of law by offering evidence from which a reasonable trier of fact could rationally either: (1) disbelieve the employer's offered reason; or (2) conclude that a discriminatory motive has more likely than not a motivating reason behind the employer's action. Keller v. Orix Credit Alliance, 130 F.3d 1101, 1108 (3d Cir. 1997).

Plaintiff asserts that the jury could have found for him based solely on the elements of his prima facie case and a conclusion that Muhlenberg's proffered legitimate explanation was merely pretextual because the hospital incorrectly concluded that he struck a patient. Plaintiff fails to recognize, however, that

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[1] For the purposes of this Opinion, the Court has accepted the validity of Plaintiff's prima facie case under both claims of discrimination.

> [t]o discredit the employer's proffered reason . . . the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent. Rather, the non-moving plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, and contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them 'unworthy of credence.'

Fuentes, 32 F.3d at 765 (internal citations omitted) (emphasis added)(quoting Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 531 (3d Cir. 1992)).

Under Rule 50(a), "[I]f during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for their party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue." Fed. R. Civ. P. 50(a). A court should grant a motion for judgment as a matter of law "only if viewing the evidence in the light most favorable to the party opposing the motion, no jury could decide in that party's favor." Walter v. Holiday Inns, Inc., 985 F.2d 1232, 1238 (3d Cir. 1993). To survive Muhlenberg's Motion for Judgment as a Matter of Law, Plaintiff must have "produced sufficient evidence to raise a genuine issue of fact as to whether the employer's proffered reasons were not its true reasons for the challenged

employment action." Sheridan v. DuPont, 100 F.3d 1061, 1067 (3d Cir. 1996). Because Plaintiff offered no evidence which would permit a reasonable jury rationally to conclude that the employer's proffered explanation was a fabrication, he failed to meet this burden.

At trial, Plaintiff elicited testimony from four witnesses and introduced seven exhibits into evidence. The record he created, however, lacks any evidentiary basis from which a reasonable jury could rationally conclude that Muhlenberg's proffered non-discriminatory reason for firing him, namely, that he punched a patient in violation of undisputed hospital policy, was fabricated. Plaintiff rested virtually all of his charge of pretext on the claim that he did not, in fact, punch the unruly patient during the incident in question. In this regard, Plaintiff testified repeatedly that, although he did physically restrain the patient, he never used his fist to strike him.[2] (Tr. Oct. 14, 1998, at 120-22; Tr. Oct. 15, 1998, at 36, 38, 40.)

Plaintiff's case amounts simply to an allegation that Muhlenberg was in error in its belief that he had struck the patient. Even if Muhlenberg's decision were wrong, however, that alone would not support a jury finding that the reason proffered by Muhlenberg for its decision was pretextual. See Billet, 940 F.2d at 825; Murray v. SEPTA, No. CIV.A. 96-7971, 1998 WL 98987, at *5 (E.D. Pa.

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[2] However, Plaintiff also conceded on cross-examination: "maybe I punch his face. Maybe, I don't know." (Tr. Oct. 15, 1998, at 61.) Debbie Schaedel, a nurse who was present during the incident, testified that she did not see Plaintiff strike the patient. (Tr. Oct. 14, 1998, at 29-30.) Ms. Schaedel also testified, however, that the reason she had not seen a punch was that she was not in a position to see a punch, even if one had been thrown. (Tr. Oct. 14, 1998, at 45.)

March 9, 1998)(Waldman, J.). It is not for the Court to second guess an employer's personnel decision, without any evidence that age or race was a determinative factor in the result. Tenthoff v. McGraw-Hill, Inc., 808 F. Supp. 403, 405-06 (E.D. Pa. 1992). In Murray v. SEPTA, Judge Waldman dealt squarely with this issue:

> Plaintiff argues that he was not in fact guilty of the infraction for which he was discharged. This is not sufficient to show pretext. An employer may terminate an employee fairly or unfairly and for any reason or no reason at all without incurring Title VII liability unless the decision was motivated by invidious discrimination. Beser v. Quaker State Oil Refining Corp., 72 F.3d 326, 331 (3d Cir. 1995).
>
> It is the employer's belief that plaintiff violated company policy that is important. See Fuentas, 32 F.3d at 765 ("To discredit the employer's proffered reason, the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent or competent"); Billet v. CIGNA Corp., 940 F.2d 812, 825 (3d Cir. 1991)("what matters is the perception of the decision maker"); Holder v. City of Raleigh, 867 F.2d 823, 829 (4th Cir. 1989)("A reason honestly described but poorly founded is not a pretext")(citation and internal quotations omitted); Hicks v. Arthur, 878 F. Supp. 737, 739 (E.D. Pa.) (that a decision is ill-informed or ill-considered

does not make it pretextual), aff'd, 72 F.3d 122 (3d Cir. 1995)(it is the perception of the decision-maker that is relevant); Orisakwe v. Marriott Retirement Communities, Inc., 871 F. Supp. 296, 299 (S.D. Tex. 1994)(employer who wrongly believes employee violated company policy does not discriminate when he acts on that belief).

Murray, 1998 WL 98987, at *5-6.

Plaintiff failed to offer any evidence that Muhlenberg did not believe that he struck the patient. Plaintiff's counsel called William Mason, then president and CEO of Muhlenberg, as a hostile witness. Mason testified that he decided to fire Plaintiff only because he had been reliably informed, after an investigation by trusted employees, that Plaintiff had punched a patient in violation of hospital policy. (Tr. Oct. 14, 1998, at 81.)[3]

At trial, Plaintiff conceded that if he had struck the patient during the incident in question, his conduct would

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[3] Mason testified that he made his decision in reliance upon the recommendation of Jeff Beich, then vice-president of Muhlenberg operations, who had worked under and reported directly to Mason for fifteen years and with whom he shared a relationship of trust and reliance. (Tr. Oct. 14, 1998, at 74.) Beich's recommendation came to Mason after a hospital investigation including several members of management staff, including the head security and the supervisor of the emergency room. (Tr. Oct. 14, 1998, at 80.) Mason further testified that the investigation and recommendation process was consistent with his policy of delegating authority to management. (Tr. Oct. 14, 1998, at 86-87.) In addition to his written statement, (Pl.'s Ex. 2), Plaintiff was afforded the opportunity to orally recount his version of the events to his supervisor, the head of security, before his termination. (Tr. Oct. 15, 1998, at 66-67).

have violated hospital policy. Asked on cross-examination about his understanding of Muhlenberg's use of force policy in effect during the incident, Plaintiff testified as follows:

> Q. All right, Mr. Rodriguez, again, starting at line 12 [of your deposition], the question, "What were the hospital's rules as you understood them as far as having physical contact with patients? What were the rules?" Your answer, "The rules is not to hurt the patient, not hit him but just use restraint, you know." And in parenthesis there is the ent. I always do my job, did my job, just protect the nurses and that's what I was told to do by Bill Schneck, protect the hospital staff. And that was my job, and that's exactly what I did. I didn't abuse the patient, I just tackle him.
> Q. Mr. Rodriguez, referring to the same page [of your deposition], page 130. Was this testimony that you gave accurate? Line 23. Question from me, "So, you would agree with me that even if a patient punches you in the face, you cannot respond by in turn punching that patient in the face?""Answer, No, I'm not supposed to do that." "Question, You agree with me?" "Answer, Absolutely. I'm not supposed to hit him back. I'm supposed to block, defend myself."
> A. And that's exactly what I did.
> Q. That's, your testimony [and it] is truthful, correct? This deposition testimony is truthful testimony?
> A. Yes.
> Q. Okay. And on the next page, which I think you've turned to, 131?
> A. Yes, I've got it.
> Q. Is this accurate testimony that you gave on that

day at line 11: "Let me ask you this question. If on October 28 when this happened you had punched this man in the face after he punched you, that would have been wrong on your part?" Your answer, "After he hit me, if I punch him back?" "Question, Yes,?" "Answer, I'm wrong." "Question, And if that happened, would you agree with me that you should have been disciplined for that?" "Answer, Yes, disciplined, yes, disciplined." Is that all truthful testimony, sir?
A. Yes, but again, I never abused or hit the patient.

(Tr. Oct. 15, 1998, at 38-40 (emphasis added).) Plaintiff thus testified in no uncertain terms that, under the circumstances of th incident in question, it would have been punishable conduct pursuant to undisputed hospital policy to have punched the patient.[4] Plaintiff's own witness, Ms. Schaedel, testified that she had been struck by patients herself in the past but had never once struck back. When asked if she knew that to do so would be improper, she replied, "Oh yes. It's not done." (Tr. Oct. 14, 1998, at 40-41.) Moreover, Plaintiff failed to produce any evidence that this policy was selectively enforced against him in inconsistent or uneven fashion.

III. CONCLUSION

Plaintiff admitted that it would have been against Muhlenberg policy and practice to have punched a patient under the circumstances he faced on October 28, 1995. He also failed to produce any evidence that the relevant Muhlenberg decision-makers fabricated their belief that he had punched a patient unde those circumstances. Therefore, Plaintiff has failed to offer an evidentiary basis upon which a reasonable trier of fact could

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[4] Plaintiff conceded that, under the circumstances of the incident, the "reasonably believes" and "minimum amount of force necessary" mandates of Exhibit 9a-2 precluded him from hitting "John Doe." (Tr. Oct. 15, 1998, at 77.)

rationally conclude that Muhlenberg's proffered reason for firing him was pretextual. As Plaintiff himself admitted, any other conclusion would be nothing more than speculation. [5] Accordingly, the Court has entered judgment as a matter of law in favor of Muhlenberg.

BY THE COURT:

/s/ Bruce W. Kauffman, J.

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[5] At trial, Plaintiff acknowledged the truthfulness of the following testimony from his oral deposition:

Q. Please identify for me all of the reasons why you believe Mr. Mason fired you because you are Hispanic?
A. I don't have any reason. That's what I believe.
Q. Okay, can you explain why you believe that?
A. No, I can't explain why I believe but I believe that was the reason.
Q. You are speculating, isn't that right?
A. Yeah.

(Tr. Oct. 15, 1998, at 74.)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

MIGUEL RODRIGUEZ	:	CIVIL ACTION
Plaintiff	:	No. 97-CV-0636
v.	:	
MUHLENBERG	:	
HOSPITAL CENTER	:	
Defendant	:	

MEMORANDUM ORDER

AND NOW, this 25th day of June, 1998, upon consideration of the Motion of defendant Muhlenberg Hospital Center ("Muhlenberg") for Summary Judgment, and the response of plaintiff Miguel Rodriguez ("Rodriguez") thereto, it is ORDERED that Muhlenberg's Motion is DENIED.

"On summary judgment, it is not the Court's role to weigh the disputed evidence and decide which is more probative." *Lawrence v. National Westminster Bank New Jersey*, 98 F.3d 61, 67 (3d Cir. 1996). In ruling on summary judgment in an employment discrimination case, the Court's role is "to determine whether, upon viewing all the facts and inferences to be drawn therefrom in the light most favorable to the plaintiff, there exists sufficient evidence to create a

genuine issue of material fact as to whether the employer intentionally discriminated against the plaintiff." *Hankins v. Temple University*, 829 F.2d 437, 440 (3d Cir. 1987).

To discredit an employer's proffered reason for an adverse employment action, a plaintiff must show such weaknesses, implausibilities, inconsistencies, incoherence or contradictions in the reasons articulated by the employer that a jury reasonably could find them unworthy of belief. *Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994). *See also Lawrence*, 98 F.3d at 67 ("[T]he question is whether the record could support an inference that the employer did not act for a non-discriminatory reason.").

For eleven years, Rodriguez' employment record as a security officer for Muhlenberg was unblemished. One night an intoxicated patient brought into the emergency ward by the police began physically attacking nurses. Security was called and Rodriguez responded. The drunken patient, a large man in excess of two hundred pounds, punched Rodriguez in the face, breaking his glasses. Although Rodriguez was at a great size disadvantage, he managed to restrain the patient until assistance arrived.

Rather than receive a commendation, Rodriguez was fired for violating Muhlenberg's alleged, *undocumented* policy that *no* circumstances should a security officer ever strike or hit a patient. In fact, Muhlenberg's *written* policy expressly authorizes security officers to "use force against a person when he reasonably believes such force is necessary for self

defense, in order to protect himself [or others] from bodily harm." [Exhibit "D" to Plaintiff's Response to Defendant's Motion for Summary Judgment]. Nothing in the record suggests that Rodriguez violated this written policy.

Moreover, Rodriguez denies under oath ever striking or hitting the patient, and claims that he was fired because of his age and national origin. While eyewitness testimony is in conflict, a nurse at the scene testified that she never saw Rodriguez strike the patient, and the administrator who investigated the incident could remember nothing about either the incident or her purported investigation. In sum, there is plainly sufficient evidence of record from which a reasonable jury could conclude that Muhlenberg's proffered reason for firing Rodriguez was mere pretext for a discriminatory reason. *See Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577 (1978)("when all legitimate reasons . . . have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his consideration on an impermissible consideration such as race"): *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1067-69 (3d Cir. 1996).

Accordingly, the issue of whether Muhlenberg fired Rodriguez for his alleged violation of an unwritten policy or for a discriminatory reason can only be determined by the finder of fact, and the Motion for Summary Judgment must be denied. *See Smith v. Borough of Wilkinsburg*, No. 97-CV-3133, _____ F.3d _____, 1998 WL 324608, at *8 (3d

Cir. June. 17, 1998)(jury is permitted to "use the evidence that supported plaintiff's prima facie case coupled with their rejection of the reasons offered by the employer for the employment decision to conclude that employer intentionally discriminated").

BY THE COURT:

/s/ Bruce W. Kauffman, J.

Entered June 26, 1998.

42 USC §2000e-2(a)-Unlawful employment practices

"It shall be an unlawful employment practice for an employer-

(1)...to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's...national origin;"

42US §623(a)-Prohibition of age discrimination

"It shall be unlawful for an employer-

(1)...to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileged of employment, because of such individual's age"

Supreme Court, U.S.
FILED
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No. _____

In The Supreme Court of the United States

MIGUEL A. RODRIGUEZ,
Petitioner,

v.

MUHLENBERG HOSPITAL CENTER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF ISSUE

Did The District Court Properly Determine That Rodriguez's Evidence Did Not Cast Sufficient Doubt Upon Muhlenberg Hospital Center's Reason For Terminating Rodriguez's Employment, When Rodriguez Was Terminated For Striking A Patient?

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1999

MIGUEL A. RODRIGUEZ,

Petitioner,

v.

MUHLENBERG HOSPITAL CENTER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

Rodriguez is an Hispanic male born 62 years ago in Puerto Rico. Since 1984, the Muhlenberg Hospital ("Hospital") continuously employed Mr. Rodriguez as a security guard.

In the early 90s, Rodriguez, as part of his job, drove hospital vehicles. In 1991, the Commonwealth suspended Rodriguez's driver's license for 90 days as a result of a "DUI" conviction. Although Rodriguez was unable to do his job as a result of the license suspension, the Hospital neither suspended nor fired him. In fact, the Hospital permitted Rodriguez to continue working, in a non-driving capacity, during the 90 day license suspension period. Rodriguez concedes, moreover, that the Hospital had always treated him "very fairly" up until his discharge.

On October 28, 1995, Rodriguez, during his second shift, was involved in an altercation with an unruly, drunk patient in the Hospital's Emergency Room ("ER"). The Hospital investigated the ER incident after an ER nurse reported that Rodriguez had struck the patient.

William Mason was then the Hospital's President and Chief Executive Officer ("CEO"). Jeffrey Beich was the Hospital's Vice-President of Operations and Chief Operating Officer. Mason and Beich had worked together at the Hospital for 15 years.

Beich reported to Mason that the investigation revealed that Rodriguez had, in fact, struck the unruly patient in the ER. Mason, the Hospital's President and CEO, had final authority over the decision to terminate Rodriguez. After Beich told Mason that Rodriguez had, in fact, struck the unruly patient in the ER, Mason decided to fire Rodriguez. Mason decided to terminate Rodriguez because, in Mason's view of Hospital

policy, under no circumstances should a Hospital employee ever strike a patient.

Rodriguez denied striking the patient. Rodriguez admits, however, that had he struck the patient, he would have violated Hospital policy, which would have been grounds for his immediate termination. In fact, every witness who testified in Rodriguez' case-in-chief stated unequivocally that Hospital policy flatly prohibited Rodriguez from striking the patient.

Rodriguez testified that he knew of no other Hospital employee, during his eleven (11) year employment, whom the Hospital treated unfairly, or discriminatorily, on account of his or her age or Hispanic national origin. Rodriguez also testified that the Hospital, at least until his discharge, had treated him "very fairly."

REASONS FOR DENYING THE WRIT

The instant petition does not present this Honorable Court with any controversial legal principles or conflict among the Circuit Courts of Appeals warranting review. The issues in this case, both legally and factually, are unremarkable.

In short, the only issue raised on appeal is whether, factually, Petitioner presented enough evidence to the jury to establish that the Hospital's decision for terminating him was pretextual. Rodriguez failed to produce sufficient evidence, at trial, thereby warranting the trial court's granting the Hospital's Motion for Judgment as a Matter of Law pursuant to Fed. R. Civ. P. 50(a).

Rodriguez questions not the reason for his discharge, but to the contrary, the wisdom of the judgment to terminate his employment.

The standard for the granting of a judgment as a matter of law is well-settled: viewing the evidence in a light most favorable to Petitioner, the court must determine whether a jury could properly decide in the Petitioner's favor. *Walter v. Holiday Inns, Inc.*, 985 F.2d 1238 (3d Cir. 1993).

The district court at trial, and the Third Circuit Court of Appeals, concluded that Rodriguez had failed to adduce sufficient evidence to warrant submission of the issue to the jury.

In order for Rodriguez to have prevailed, he must have first established a *prima facie* case of discrimination. To establish a *prima facie* case under Title VII or the Age Discrimination in Employment Act, Rodriguez needed to show (1) he was a member of a protected class (Hispanic and over 40); (2) he was qualified for the position; (3) he was dismissed despite being qualified; and (4) he was replaced by a person sufficiently younger to allow an inference of discrimination.

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); *Billet v. CIGNA Corp.*, 940 F.2d 812 (3d Cir. 1991).

Rodriguez satisfied the *prima facie* case requirement. Nevertheless, merely satisfying the *prima facie* requirement does not end the inquiry. Upon establishing a prima *facie case*, the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas*, 411 U.S. at 802. The Hospital met this burden by establishing that Rodriguez was fired because he struck a patient. In this regard, the Hospital CEO testified that, based upon his understanding of the facts, there was no doubt in his mind that Rodriguez's behavior was inappropriate.

Once the employer, as here, comes forward with a legitimate reason for the discharge, the burden shifts back to Rodriguez to set forth evidence which would have allowed the fact finder to either (1) disbelieve the employer's proffered reason, or (2) conclude that discrimination was more likely the primary motivation behind the firing. *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994). It is here where Rodriguez failed.

Rodriguez argued that he produced evidence from which a fact finder could disbelieve the Hospital's stated reason. Such evidence, however, must be sufficient to establish more than that the stated reason was wrong, but that it was so plainly wrong that it could not have been the true reason for the discharge. *Keller v. Orix Credit Alliance Inc.*, 130 F.3d 1101, 1109 (1997).

Rodriguez's "pretext" argument consists solely of an alleged divergence between the understanding by the Hospital's CEO, Mr. Mason, the decision maker, of the Hospital's "use of force" policy and the alleged policy set forth by Rodriguez.

This position is incorrect. Rodriguez bases his pretext argument on a document that was never identified as Hospital

policy. First, no witness at trial identified the policy alleged by Rodriguez as, Hospital policy with respect to the use of force. While Mason testified that the Hospital had a written "use of force" policy, he was unable to identify it. Rodriguez, too, testified that he could not remember ever receiving the document in question as the Hospital "use of force" policy. Rodriguez, however, did remember receiving a "SECURITY" policy. The "SECURITY" policy does not address "use of force."

Both Rodriguez and Mason also testified that the Employee Handbook's patient abuse "Termination" provision reflected Hospital policy that would have justified Rodriguez's immediate termination had Rodriguez struck the ER patient.

Even assuming that the document identified by Rodriguez was the Hospital's use of force "policy" at the time of his discharge, Rodriguez admitted that, had he hit the patient, he would have been in violation of this alleged "policy." In fact, Rodriguez admitted time and again that had he struck the patient he would have been in violation of Hospital policy, and his termination would have been justified.

Rodriguez, then, placed all of his "pretext" eggs at trial in the flimsiest of "policy" baskets. The sole evidence of pretext he points to is the so-called "difference" between the alleged policy's minimum force requirement and Mason's understanding, based on practice and the Employee Handbook's "patient abuse" language, that an employee's striking of a patient always constitutes an unacceptable use of force. Rodriguez admits, moreover, that had he struck the patient, he would have offended the policy's minimum use of force requirement.

Critically missing from both Rodriguez's proof and argument, moreover, is a nexus or logical connection between Mason's understanding and application of the Hospital's "use

of force" policy and Rodriguez's age and/or national origin. That is because no such connection or nexus exists.

Assuming that the policy identified by Rodriguez was the Hospital's use of force "policy" and that Rodriguez used the appropriate, minimum level of force under that "policy," Mr. Mason's so-called misapplication of this "policy" does not, on this record, render his decision to fire Rodriguez pretextual, as

> to discredit the employer's proffered reason...the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, or competent.

Fuentes, 32 F.3d at 765. Mason's alleged misapplication of the minimum use of force "policy" does not therefore cast substantial doubt on the honesty of the reason that Mason had for firing Rodriguez: the striking of a patient.

The court's agnosticism regarding challenges to the wisdom, measure and mercy of personnel decisions is well-taken. Federal judges, courts and/or juries are ill-suited to act as personnel boards ruling on the strength or wisdom of "cause" for discharge. *Keller*, 130 F.3d at 1109; *Carson v. Bethlehem Steel Corp.*, 82 F.3d 157, 159 (7th Cir. 1996) ("[F]ederal courts are not arbitral boards ruling on the strength of cause for discharge. The question is not whether the employer made the best, or even sound, business decision; it is whether the real reason is [discrimination].").

This Court, then, must not confuse possible disagreement about the wisdom of Mason's decision to fire

Rodriguez with disbelief about whether that reason was genuine. *See e.g., Combs v. Planation Planters*, 106 F.3d 1519, 1543 (11th Cir. 1997) ("[A] plaintiff may not establish that an employer's proffered reason is pretextual merely by questioning the wisdom of the employer's reason, at least not where, as here, the reason is one that might motivate a reasonable employer."), *cert. denied*, 118 Ct. 685, 139 L. Ed. 2d 632 (1998); *Smith v. Stratus Computers, Inc.*, 40 F.3d 11, 16 (1st Cir. 1994), *cert. denied,* 514 U.S. 1108 (1995) (stating that relief will not be granted "to a plaintiff who has been discharged unfairly, even by the most irrational of managers, unless the facts and circumstances indicate that the discriminatory animus was the reason for the decision").

This Court has instructed time and again that courts "must not infer a particular type of discrimination from circumstances that merely indicate a wrongful firing of some sort." This is just what Rodriguez, by his strained "misapplication of policy" argument, is asking this Court to do. *Walton v. Mental Health Ass'n of Southeastern Pennsylvania*, 168 F.3d 661, 669 (3d Cir. 1999); *Keller*, 130 F.3d at 1111 (a reasonable Fact-finder could draw only a "relatively weak inference" from the employer's failure to criticize an age plaintiff's job performance before termination); *Robinson v. National Medical Care, Inc.*, 897 F. Supp. 184, 186 n.4 (E.D. Pa. 1995) (the employer's tardiness in reviewing the race plaintiff's job performance does "not justify an inference of pretext absent evidence of disparate treatment"), *aff'd*, 77 F.3d Cir. 1996) ; *see also, EEOC v. Texas Instruments Inc.*, 100 F.3d 1173, 1182 (5th Cir. 1996) ("This court has observed that an employer's disregard of its own hiring system does not of itself conclusively establish that improper discrimination occurred or that a nondiscriminatory explanation for an action is pretextual. A discharge may well be unfair or even unlawful and yet not be

evidence of age bias under the ADEA. **To make out an ADEA claim, the plaintiff must establish some nexus between the employment actions taken by the employer and the employee's age. A bald assertion that one exists...simply will not suffice.**") (case citations and internal punctuation omitted). Mere possibilities or conjectures of pretext, then, do not entitle discrimination plaintiffs to a free jury pass. *Tenthoff v. McGraw-Hill, Inc.*, 808 F. Supp.403, 407 (E.D. Pa.), *aff'd*, 981 F.2d 1248 (3d Cir. 1992).

Shepherd v. Slater Steels Corp., 168 F.3d 990 (7th Cir. 1999) underscores the steadfast judicial unwillingness to infer pretext from merely "unfair" adverse employment decisions involving discrimination plaintiffs. The plaintiff, Lincoln Shepherd, Jr., brought a Title VII sexual harassment and retaliatory discharge lawsuit against his former employer, Slater Steels Corporation ("Slater"). The crux of this lawsuit was that Mr. Shepherd's co-worker, Edward Jemison, through sexually-charged remarks and outrageous behavior, had rendered Mr. Shepherd's work environment hostile and that Slater ultimately discharged Mr. Shepherd in retaliation for complaining of Jemison's sexual harassment. *Id.*, 168 F.3d at 1000.

Although Mr. Shepherd had complained to his supervisors about Jemison's at times brutal sexual harassment, Slater failed to take prompt, appropriate remedial measures. Due to Slater's failure to remedy, the tension between the men grew daily and both men came to blows on company premises. Afterwards, both men were discharged for fighting. *Id.*, 168 F.3d at 1012. The district court entered summary judgment in favor of Slater on the retaliatory discharge claim, and the Seventh Circuit affirmed.

Shepherd conceded that fighting was legitimate grounds for termination. *Id.*, 168 F.3d at 1012 n.12. He argued,

however, that his discharge was unfair because the fight resulted from Slater's lackluster investigation and failure to act promptly in stopping the harassment . *Id.* The Seventh Circuit, however, rejected this "unfairness as pretext" argument:

> The question before us, however, is not whether engaging in an altercation is or is not an appropriate ground for discharge... . The only issue that concerns us is whether the stated ground is the real reason that Slater discharged Shepherd. If, as Shepherd contends, the fight was the inevitable result of Jemison's unchecked harassment, then that would certainly reflect on the adequacy of the steps that Slater took to investigate and respond to Shepherd's complaints. **But absent some proof that Slater itself did not genuinely believe that the fight warranted discharge -- that it did not fire other employees who fought so ferociously, for example -- we cannot say that the reason for Shepherd's discharge was pretextual simply because the company may have been unfair.**

Id., 168 F.3d at 1012 n.12 (bold type added).

Similarly, Rodriguez' evidence did not place in dispute the Hospital's decision maker's genuinely held belief, one formed after an investigation, that Rodriguez had struck the patient and that this conduct warranted Rodriguez' immediate termination. In addition, Rodriguez offered no evidence that any non-protected Hospital employees engaged in similar conduct but were not terminated. In sum, the reason for Rodriguez' discharge was not pretextual merely because Rodriguez perceived his firing as unfair.

CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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